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Civil Liability Relief for Brownfields Developers

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Chapter 8

Civil Liability Relief for Brownfields Redevelopers

Stepan Wood*

Introduction

Owners and potential developers of brownfield sites in Canada have argued for years that civil liability¹ is a major obstacle to brownfields redevelopment. In 2003 the National Round Table on Environment and Economy recommended that governments enact legislation providing for eventual termination of civil liability for parties who complete an approved cleanup of a brownfield site.²

Developments in 2006 suggest that things are starting to move on this issue. The New Brunswick Liability Working Group, established in September 2004 at the request of the Atlantic PIRI group to study and make recommendations on the issue of liability, finished its work in 2006 and its report is likely to be released soon.³ In December 2005, the government of Ontario established a Brownfields Stakeholder Group to

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¹ For purposes of this chapter, “civil liability” means liability to a party other than government, arising under common law as opposed to legislation.

² National Round Table on the Environment and the Economy, *Cleaning Up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada* (Ottawa: NRTEE, 2003) at pp. 25-30.

³ Atlantic PIRI (“Partnership in RBCA Implementation”), www.atlanticrbca.com, is a multi-stakeholder group in which the four Atlantic provincial governments work with non-governmental experts to develop and implement a risk-based corrective action process to clean up contaminated sites in Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador. The New Brunswick Liability Working Group has 14 members representing banks, industry, lawyers, insurance companies and government. No environmental NGO or other civil society organization is represented on the group. Release of the group’s final report was delayed by the election of a new

provide a sounding board on brownfields law and policy.⁴ The group met twice in 2006. One meeting was devoted to developing a common understanding of the liability issue and exploring potential solutions. In October, Ontario's Minister of Municipal Affairs told the Canadian Brownfields 2006 conference in Toronto that "we're close to coming to a consensus" on liability issues.⁵

Civil liability, in short, is squarely on the radar screens of several provincial governments. Deliberations appear to have advanced to the stage that some sort of action can be expected soon, although it is too early to predict what kind. Participants in the debate often refer to developments in other jurisdictions – particularly the United States – to support their positions. Until now, however, information about how governments in other jurisdictions are dealing with the civil liability issue has been anecdotal, incomplete and often vague. The aim of this chapter is to begin to fill this gap by summarizing the extent to which governments in the United States offer relief against third party civil liability to stimulate brownfields redevelopment, and asking what lessons this might hold for Canada.

Several kinds of parties face potential civil liability risk in relation to brownfields redevelopment. Alongside the original polluter(s), these include various relatively "innocent" parties who did not actually cause or contribute to the contamination, such as:

- persons who owned or operated a site at the time it became contaminated but did not cause or contribute to the contamination;
- persons who acquired property without knowledge of the contamination, despite having made reasonable inquiries at the time of acquisition ("innocent landowners");
- persons who acquired or plan to acquire property *knowing* it is contaminated but intending to clean it up and redevelop it ("prospective purchasers" before acquisition and "bona fide purchasers" thereafter);
- persons who acquired a property after it was cleaned up;
- owners or operators of nearby property that became contaminated as a result of migration of contamination from a contaminated site ("contiguous owners");

provincial government, but as of November 2006 the Working Group expected to present its report and implementation plan to the government imminently.

⁴ The Brownfields Stakeholder Group is made up of approximately 25 organizations representing developers, industry, lenders, insurers, environmental consultants, lawyers, planners and municipal and federal governments, along with two environmental NGOs.

⁵ The Honourable John Gerretsen, Ontario Minister of Municipal Affairs and Housing, speech to Canadian Brownfields 2006 conference, Toronto (October 26, 2006) (speaking notes available from MAH Web site, www.mah.gov.on.ca).

- secured lenders; and
- municipalities that become owners of contaminated sites, often involuntarily.

This chapter is restricted to one subset of these parties, namely "innocent" owners and operators who acquire a site that is already contaminated and who did not cause or contribute to the contamination. This includes, to use the prevailing American terminology, "innocent landowners", "bona fide purchasers", "prospective purchasers", "contiguous landowners", and "post-cleanup purchasers". These parties have received the most attention in Canadian debates about civil liability relief. This chapter does not address legislation regarding civil liability of polluters, lenders, fiduciaries, or municipalities. Nor does it address legislation restricted to specific contaminants, such as dry cleaning solvents or petroleum.⁶

Civil Liability Relief for Innocent Owners and Operators in the United States

The U.S. federal government and the majority of state governments have not seen fit to relieve any innocent owners or operators of contaminated land against civil liability to third parties.⁷ While federal legislation and regulations have been enacted or amended numerous times since the early 1990s to limit *regulatory* liability for parties such as secured lenders, innocent landowners, contiguous landowners, *bona fide* purchasers and prospective purchasers, such relief does not extend to civil liability.

For example, the U.S. Environmental Protection Agency's Prospective Purchaser Agreements and Brownfields Covenants Not to Sue do not purport to limit injured third parties' rights to sue in tort.⁸ Nor does the federal *Small Business Liability Relief and Brownfields Revitalization Act of 2002*, which protects small businesses, innocent landowners and *bona fide* prospective purchasers against *regulatory* liability only.⁹ Similarly, many states have introduced voluntary cleanup programs under which purchasers or prospective purchasers who complete a voluntary cleanup to the satisfaction of state environmental regulators receive some form of liability relief in return. The majority of these programs do not purport to limit civil liability to parties other than the state, and some expressly preserve it.¹⁰ The

⁶ See Stepan Wood, *Brownfields Civil Liability Relief: A Survey of Statutory Developments in the United States, United Kingdom and Australia*, report prepared for the Ontario Ministry of Municipal Affairs and Housing (October 23, 2006), available on request from brownfieldsonario@ontario.ca, for a detailed discussion of these issues.

⁷ The same appears to be true for the United Kingdom and Australia. Wood, *ibid.*

⁸ Michael B. Gerrard, ed., *Brownfields Law and Practice* (Newark, N.J.: Matthew Bender, 1998), chapter 13, "EPA Prospective Purchaser Agreements and Comfort/Status Letters".

⁹ P.L. 107-118, January 11, 2002, 115 Stat. 2356.

¹⁰ E.g., N.Y. Environmental Conservation Law § 27-1421 ("Nothing in this section shall

farthest most states and the federal government go is to relieve certain cleanup contractors and “Good Samaritans” who assist with hazardous spills against civil liability arising out of releases caused or exacerbated by their actions.

Seven U.S. states – Florida, Iowa, Massachusetts, Michigan, Missouri, New Jersey and Virginia – have enacted legislation designed to immunize innocent owners and operators of brownfields against civil liability to some degree. A further four states – Alabama, California, Connecticut and Georgia – have enacted legislation that is unclear but might be interpreted as limiting such liability. Most of these immunities are available only to a narrow class of eligible parties, in limited circumstances, subject to numerous conditions. Most appear to apply in situations where the risk of civil liability was small to begin with. These provisions are, on the whole, not widely known by brownfields lawyers, not widely relied on in practice and not perceived to be an important element of the brownfields legal regime in the U.S. A leading U.S. brownfields lawyer characterizes them as being “below the radar screens” of brownfields practitioners.¹¹

Many of these legislative provisions are drafted in vague, ambiguous or convoluted terms that make it very difficult to ascertain whether, how, or to what extent they limit third party civil liability. Almost none of them have been tested in court, as a result of which it is difficult to predict how they might be interpreted. In the U.S., as in other common law jurisdictions, a statute will generally not be interpreted as limiting or removing common law rights of action unless it does so unequivocally or is so repugnant to the common law that the two cannot coexist, and this principle has been invoked to hold that a purported brownfields civil liability limitation did not bar a private lawsuit.¹² It is therefore safe to assume that limitations of civil liability will be construed narrowly in favour of affected third parties and must be clear and unequivocal to take effect. This is to say nothing of such provisions’ constitutional validity.¹³ For purposes of this chapter, the provisions characterized as “uncertain” are included along with those that clearly purport to limit civil liability, with an explanation why they were classified as uncertain.

affect the liability of any person with respect to any civil action brought by a party other than the state”); Minnesota Environmental Response and Liability Act, Minn. Stat. § 115B.12 (“nothing in [the statute] shall be construed to limit or restrict in any way the liability of any person under any other state or federal law, including common law, for loss due to personal injury or disease, for economic loss, or for response costs arising out of any release or threatened release”).

¹¹ Interview with Michael Gerrard, Arnold & Porter, New York (October 17, 2006).

¹² *Courtney Enterprises, Inc. v. Publix Super Markets, Inc.*, 788 So.2d 1045, rehearing denied, review denied 799 So.2d 218 (Fla. C.A., 2d Dist., 2001) (interpreting Florida’s dry cleaning contamination liability relief legislation, which is not discussed in this chapter; see Wood, *op. cit.*, footnote 6, at pp. 17-18).

¹³ See *Bormann v. Board of Supervisors In and For Kossuth County*, 584 N.W.2d 309 (Iowa, 1998) (holding nuisance immunity provision in right-to-farm legislation unconstitutional).

Rather than reciting the details of all of these statutory provisions, the chapter focuses on those that appear the most noteworthy. For each of these “key” immunity provisions, the chapter describes who is eligible for immunity, the scope of immunity, the conditions for obtaining or maintaining it, the events that trigger it, and any “reopeners” of liability. There is remarkable variation on all of these points. Thereafter the chapter summarizes developments in other states, very briefly.

Michigan

Michigan has two legislative provisions, in force since 1995, that provide limited civil liability protection to innocent parties and, in some circumstances, polluters. First, parties who are explicitly exempted from statutory cleanup liability and who comply with a statutory obligation to prevent further exposure are immune against statutory or common law claims for performance of cleanup activities with respect to pre-existing contamination.¹⁴

- *Eligibility:* Anyone who is expressly exempted from statutory cleanup liability is eligible. This includes innocent landowners. It also includes *bona fide* or prospective purchasers who conduct a “baseline environmental assessment” (BEA) within 45 days of acquiring the property and disclose the results to the state and any subsequent transferee. No government determination of eligibility is required. Polluters who have complied with Michigan’s cleanup legislation¹⁵ are also eligible.
- *Scope:* Because immunity may be available to polluters, it is confined to “a claim in law or equity for performance of response activities”¹⁶ and explicitly excludes tort claims for consequential damages.¹⁷ The purpose is to bar civil claims similar to statutory cleanup or cost recovery claims and prevent third parties from doing an end run around the statute.
- *Conditions:* Eligible parties who know of contamination on their property must comply with a statutory duty to prevent exacerbation of existing contamination, exercise “due care” to mitigate

¹⁴ Michigan Environmental Response Act, Mich. Comp. L. § 324.20142(1).

¹⁵ This requires, among other things, that the polluter determine the nature and extent of the release, report it, stop it at the source, immediately take any practical and cost-effective response actions, and “diligently pursue” cleanup to regulatory criteria. Environmental Response Act, § 20114.

¹⁶ Environmental Response Act, § 20142(1).

¹⁷ Immunity does not cover “tort claims unrelated to performance of response activities”, “tort claims for damages which result from response activities”, or “tort claims related to the exercise or failure to exercise responsibilities under section 20107a”. Environmental Response Act, § 20142(2).

hazards, and take precautions against foreseeable actions of third parties.¹⁸

- *Timing*: Immunity attaches automatically upon meeting the eligibility requirements.
- *Reopeners*: Liability is reopened for new releases for which the party is responsible.

Bona fide and prospective purchasers who are not satisfied with the immunity available automatically under the previous provision may apply to the state, within six months of completing a BEA, for a determination that they are exempt from statutory liability on the basis of having conducted a BEA, and that their proposed use of the property will satisfy their statutory "section 7a" duty.¹⁹ Upon a positive determination, they are immune against liability for response activity costs, fines, penalties, natural resource damages or equitable relief under statute or common law resulting from contamination identified in the petition or from undiscovered pre-existing contamination. Because this second immunity is available only to parties who are innocent of the contamination, it is broader than the previous one, but its exact scope is ambiguous. It is not clear, for instance, whether it is subject to the same "tort" exclusions as the previous provision.²⁰ Liability is reopened for new releases for which the party is responsible, and for a violation of the "section 7a" duty that is inconsistent with the state's determination of eligibility.

Michigan's civil liability relief was intended more or less to codify common law. The person who caused the contamination would likely be liable in tort to third parties for consequential damages, and the legislation preserves this liability. Innocent parties who did not cause the contamination and exercised due care to prevent further exposure would not likely be liable to third parties at common law except for contamination they cause themselves, and the legislation preserves this situation. The legislation only limits civil liability for parties who fulfill their "section 7a" obligation, which was intended to be equivalent to a common law duty of care (although this assumption has apparently not been tested in court).

Despite the narrow scope of liability relief, concerns have arisen that some parties are abusing it. There is no way to verify whether parties claiming immunity comply with their statutory obligations, and there are concerns that some do not. There are no clear rules as to what statutory "due care" entails or how its fulfillment is to be ensured. Because of these concerns, the first immunity provision has had little or no impact on

brownfields redevelopment. The second is popular with lenders but has had limited impact, partly because state eligibility determinations tend to be full of caveats. The entire statutory cleanup scheme is currently under review, and efforts are underway to clarify the meaning of due care and tighten liability relief rules so that parties in fact observe their due care obligations.

Massachusetts

Massachusetts has three remarkably convoluted but narrow civil liability relief provisions, enacted in 1998. They are aimed, respectively, at innocent owners or operators who complete an approved voluntary cleanup, contiguous owners, and parties (including polluters) who do not qualify for immunity under either of the first two provisions.²¹

First, innocent owners and operators of contaminated sites who did not own the property at the time of the release and who clean up the contamination to regulatory standards are immune against liability to the state or any third party for property damage under common law, for any release addressed by the cleanup.²²

- *Eligibility*: An owner or operator of a site at which there has been a release, who would be statutorily liable solely on the basis of its ownership or operation of the site, is eligible if the person did not cause or contribute to the release and did not own or operate the site at the time of the release.
- *Scope*: Eligible persons are immune against liability to the state or third parties for property damage under the common law arising from any release that has been cleaned up, except for liability arising under a contract.
- *Conditions*: The eligible person must complete a cleanup to regulatory standards as certified by a licensed waste site cleanup professional. The cleanup must comply with state law and meet the statutory standard of care of a reasonable and diligent licensed waste site cleanup professional. The person must also comply with all reporting and public notice requirements, provide site access to state officials, respond to the state's information requests, and settle any cleanup costs incurred by the state for which the person is potentially liable under the state Superfund law. The latter condition gives the state "effective veto power over the applicability of the exemption".²³

¹⁸ Environmental Response Act, § 20107a(1).

¹⁹ Environmental Response Act, § 20129a(5).

²⁰ See, e.g., Grant R. Trigger *et al.*, "Making Brownfields Green Again: How Efforts to Give Urban Centers an Economic Facelift Have Changed the Face of Environmental Policy" (1997), 76 *Mich. Bar J.* 42.

²¹ Massachusetts has also enacted liability relief for innocent tenants of contaminated sites, but this does not appear to cover common law liability. Massachusetts Oil and Hazardous Material Release Prevention and Response Act, Mass. Gen. L. c. 21E, § 2 "Owner" or "Operator", para. (e)(4).

²² Massachusetts Oil and Hazardous Material Release Prevention and Response Act, § 5C(a).

- *Timing*: Immunity attaches only upon completion of the cleanup.
- *Reopeners*: Liability may be reopened for failure to achieve the applicable cleanup criteria, new releases, violation of an activity and use limitation imposed as part of the cleanup, new exposure to pre-existing releases caused by a violation of an activity and use restriction, and releases exacerbated by the eligible person. Liability may also be reopened if the cleanup does not comply with state cleanup laws. This is noteworthy because it is not subject to a materiality criterion: immunity may be lost for minor, technical breaches.²⁴

Second, contiguous owners are protected against liability for property damage arising from a release that migrated onto the site via groundwater or surface water.²⁵

- *Eligibility*: An owner or operator of a contaminated site, who would be statutorily liable solely on the basis of its ownership or operation of the site, is eligible if the person did not cause or contribute to the release, the contamination has migrated to the person's property from off-site, and the person does not and never did own or operate any portion of the source site.
- *Scope*: An eligible person is immune against liability to the state or a third party for property damage under the common law arising from any release that originated off-site, except for liability under a contract.
- *Conditions*: The person is not required to clean up the contamination, but must take reasonable steps to prevent exposure and imminent hazards, comply with all reporting and notice requirements, provide site access, not interfere with response actions, nor exacerbate the release. No government approval is required.
- *Timing*: Immunity attaches automatically upon meeting the eligibility requirements.
- *Reopeners*: Liability may be reopened for releases exacerbated by the eligible person.

Finally, Massachusetts reserves the right to cut special deals with current or prospective owners or operators who intend to clean up and redevelop a brownfield but do not qualify for the above immunities.²⁶ The

state may enter a Brownfields Covenant Not to Sue (CNTS) Agreement under which such parties are immune against liability for property damage under the common law.

- *Eligibility*: Current or prospective owners or operators who intend to redevelop a brownfield but do not qualify for the immunities described above, for example because they caused the contamination, owned or operated the site at the time of the release, or cannot feasibly complete a cleanup to the prescribed standard, may apply for a Brownfields CNTS Agreement with the state, entry into which is entirely in the state's discretion.
- *Scope*: The agreement immunizes the person against liability to the state, or to any other person who has received notice of an opportunity to join the agreement, for property damage under the common law, but only in relation to matters expressly addressed in the agreement. The applicant must serve a state-approved "notice of rights of affected third parties" on a wide range of specified parties and publish the notice in local newspapers for three weeks.
- *Conditions*: The proposed redevelopment must provide defined public benefits such as jobs, affordable housing or open space and the state must be convinced that the project would not go ahead without customized liability relief. The applicant must submit a development plan and application for a CNTS specifying the liability protection requested, why it is justified and why the existing statutory relief is inadequate. The applicant must clean up the site to regulatory standards, but if it can convince the state that this is not feasible and it qualifies as an "eligible person", it may clean up to a "temporary solution" only. The cleanup must comply with state law (again, not subject to a materiality criterion) and meet the statutory standard of care of a reasonable and diligent licensed waste site cleanup professional.
- *Timing*: Immunity may attach before cleanup begins or only after completion, depending on whether the applicant is an "eligible person" and the type of cleanup.
- *Reopeners*: Liability may be reopened for fraud, violation of the CNTS Agreement by the applicant or a subsequent owner; new releases after the covenant vests, new exposure caused by the applicant, releases that violate use restrictions, and failure to meet "eligible person" criteria. Moreover, the state may step in at any time to take response actions itself.

²³ Seth D. Jaffe, "Massachusetts Brownfields Legislation: A Description and Analysis" (Nov./Dec. 1998), 42 *Boston Bar J.* 6.

²⁴ *Ibid.*

²⁵ Massachusetts Oil and Hazardous Material Release Prevention and Response Act, § 5D.

²⁶ Massachusetts Oil and Hazardous Material Release Prevention and Response Act, § 3A(j)(3)(c).

New Jersey

In New Jersey, since 1998, *bona fide* purchasers who complete a voluntary cleanup or can point to a previous “no further action” (NFA) letter issued by the state with respect to contamination at the site, and innocent landowners, are immune against civil liability for cleanup and removal costs and “any other damages” if they meet certain conditions.²⁷

- *Eligibility:* Immunity is available to a *bona fide* purchaser who completes an unsupervised cleanup to regulatory standards, conducts a state-supervised cleanup under an approved cleanup plan, or relies on a prior NFA letter issued by the state signifying that the site already meets regulatory standards. Immunity is also available to an innocent landowner without conducting a cleanup. Anyone claiming immunity must have disclosed the contamination to the state upon discovery and must not have been responsible in any way for the substance or the release or be related to anyone who was.
- *Scope:* There are two immunity provisions with slightly different terms. The first relieves innocent owners and *bona fide* purchasers against liability for “cleanup and removal costs or for any other damages” for the contamination under statute or common law.²⁸ This provision originally only limited the state’s ability to sue innocent owners for “natural resources damages” under either statute or common law. It was extended to third party civil liability in 1998, in conjunction with enactment of a second provision aimed explicitly at third party liability.²⁹ This second provision relieves *bona fide* purchasers against liability to anyone other than the government for “cleanup and removal costs or damages” under statute or common law. These provisions apply to on-site contamination from pre-existing releases and – for *bona fide* purchasers – off-site migration of pre-existing releases. The scope of liability relief is, however, unclear under both provisions. “Damages” are not defined. Whether these provisions extend beyond cleanup cost recovery or “natural resources damages”-style claims to include tort claims for consequential damages remains uncertain and has not been tested in court.
- *Conditions:* *Bona fide* purchasers must complete a cleanup to regulatory standards, or rely on a previously issued NFA letter. Innocent landowners need not perform a cleanup.

²⁷ New Jersey Spill Compensation and Control Act, N.J. Stat § 58:20-23.11g(d)(2), (5), and (f).

²⁸ New Jersey Spill Compensation and Control Act, § 11g(d)(2), (5).

²⁹ New Jersey Spill Compensation and Control Act, § 11g(f).

- *Timing:* For *bona fide* purchasers, immunity attaches upon successful completion of an unsupervised cleanup, upon commencement of cleanup under a state-approved cleanup plan, or automatically in reliance on an NFA letter issued for a prior cleanup. For innocent landowners, immunity attaches automatically upon meeting the eligibility requirements.
- *Reopeners:* Liability may be reopened for new releases, exacerbation of existing releases or of their impacts, failure to maintain institutional or engineering controls or otherwise comply with the cleanup plan or NFA letter, or violation of laws and regulations (like Massachusetts, this is not subject to a materiality criterion), and the state may step in at any time to conduct response actions itself.

Iowa

In Iowa anyone who acquires a contaminated property is immune against all third-party liability, provided that they did not cause the contamination, and do not “knowingly” allow a new release.³⁰ This broad immunity is remarkable given that neither a cleanup nor formal government approval is required.

- *Eligibility:* Immunity is available to any person who acquires a contaminated property, is not a “potentially responsible party” (that is, did not cause the contamination or resulting damage) or related to one, and does not knowingly cause or permit a new release that injures a third party or contaminates a third party’s property.
- *Scope:* An eligible party is immune against liability to any third party for “any liability or obligation, other than contractual obligations that specifically waive all or part of the immunity provided by [this section], arising out of or resulting from contamination of property by a hazardous substance . . . including without limitation, claims for illness, personal injury, death, consequential damages, exemplary damages, lost profits, trespass, loss of use of property, loss of rental value, reduction in property value, property damages, or statutory or common law nuisance”.³¹ The only exceptions are criminal liability and statutory cleanup liability to the state. The immunity covers pre-existing on-site releases, off-site migration unless exacerbated by the party claiming immunity, and new releases unless knowingly caused.

³⁰ Iowa Code, § 455B.752.

³¹ Iowa Code, § 455B.751.

- *Conditions*: No cleanup and no government approval is required. If experience in other states such as Michigan is any indication, this is likely to lead to concerns about abuse.
- *Timing*: Immunity attaches automatically upon meeting the eligibility requirements.
- *Reopeners*: The only reopeners are new or additional releases knowingly caused and exacerbation of off-site migration.

Connecticut

In contrast to Iowa, Connecticut enacted legislation in 2005 that operates in remarkably narrow circumstances.³²

- *Eligibility*: Connecticut has the most demanding eligibility requirements of any state. In addition to not having caused or contributed to the contamination, and completing a cleanup to the state's satisfaction, an owner of a contaminated site is eligible for relief only if he or she: (a) did not, in the state environmental department's opinion, create any conditions on the property that can reasonably be expected to create a source of pollution to state waters; and (b) is not responsible for creating any other pollution or source of pollution on the property, including not only the contamination in question but possibly pollution authorized by state permit.
- *Scope*: Eligible parties are immune against liability to any private party for "any costs or damages" with respect to any pre-existing contamination. There is no immunity for new releases. Because the statute makes no explicit reference to civil as opposed to statutory costs or damages, it is unclear whether it limits civil liability. Even if it does, the eligibility conditions are so restrictive that the immunity likely applies only in circumstances where the risk of civil liability would be very low to begin with.
- *Conditions*: The party must complete a cleanup to applicable regulatory standards and obtain state approval of both the site investigation report and a final cleanup report.
- *Timing*: Immunity attaches only upon state approval of the final cleanup report.
- *Reopeners*: Liability may be reopened for failure to comply with any land use restrictions applicable to the site, or for providing false or misleading information. The state always retains the power to step in and conduct its own cleanup.

³² Act Concerning Third-Party Liability for Contaminated Property (2005), P.A. No. 05/90 (S.B. No. 795), Conn. Gen. Stats. Ann. § 22a-133ec.

California

The final noteworthy state is California. In 2004 it enacted legislation protecting *bona fide* purchasers, innocent landowners, and contiguous property owners in designated urban in-fill areas against liability for response costs or other damages associated with a release.³³

- *Eligibility*: Immunity is available to a *bona fide* purchaser, innocent landowner or contiguous landowner who did not cause or contribute to the release and is not potentially liable due to a personal or business relationship. Only sites that are in designated urban in-fill areas but not on federal or state Superfund priority lists are eligible. The party claiming immunity must prove that it made "all appropriate inquiries" about possible contamination before acquiring the site, has exercised statutorily-defined "appropriate care" with respect to the release of contaminants at the site, has co-operated with anyone authorized to conduct response actions at the site, has complied with any land use controls in connection with any approved cleanup at the site, has complied with all government requests for information regarding releases, and has satisfied all spill notification and reporting requirements.
- *Scope*: The immunity covers liability "under any applicable statute" for response costs or "other damages" associated with a pre-existing release that has been identified in a cleanup plan and cleaned up to the state's satisfaction. There is no immunity for personal injury, death, permit violations or criminal acts, or for claims arising under contractual indemnity agreements between purchasers and sellers of real property. While the immunity only applies to liability under "any applicable statute", the Act's drafters claim that the Act was intended to bar common law claims. Bills are currently pending in the California legislature to correct this error,³⁴ but until they are enacted this provision must be classified as uncertain. Even if it applies to civil liability, however, the scope of "other damages" is unclear.
- *Conditions*: The applicant must enter an oversight agreement with the state, get state approval of a site assessment plan and cleanup plan, clean up the contamination to regulatory standards, co-operate with and provide site access to the state, obtain state

³³ California Land Reuse and Revitalization Act of 2004, CA Health and Safety Code, c. 6.82, § 25395.81.

³⁴ 2005 Cal. Assembly Bill No. 766, Cal. 2005-06 Reg. Sess. (amended/subbed June 21, 2006); 2005 Cal. Assembly Bill No. 2145, Cal. 2005-06 Reg. Sess. (introduced February 21, 2006); 2005 Cal. Assembly Bill No. 597, Cal. 2005-06 Reg. Sess. (amended/subbed June 27, 2005).

approval of the completed cleanup and pay all state oversight costs. The state may require long-term institutional or engineering controls and financial assurances.

- *Timing:* Immunity attaches upon execution of an oversight agreement with the state, before preparation of the site assessment plan.
- *Reopeners:* Liability may be reopened for new releases caused by the claimant after completion of an approved cleanup, material deviation from the oversight agreement, unilateral termination of the agreement by either party, or fraud or misrepresentation. The state may order further cleanup in the event of change to a more sensitive land use. Previously undiscovered releases not caused by the party may be covered by the immunity if resolved to the state's satisfaction. Finally, the state always retains the power to step in and conduct its own cleanup.

Other states

In Alabama, non-polluting prospective purchasers who complete a cleanup to the state's satisfaction under the state voluntary cleanup program are immune against claims by the state or third parties for cleanup costs, "equitable relief", or "damages resultant from" pre-existing releases.³⁵ Liability is reopened for new releases, violations of the cleanup plan, or intentional, wanton or wilful violations of state or federal law during the cleanup process. Since there is no explicit reference to common law, it is uncertain whether this provision limits civil liability.

Florida has several provisions that may limit civil liability in relation to contaminated land, two of which are relevant here. First, any person who did not cause or contribute to contamination at a designated brownfield site and who performs a brownfield cleanup agreement with the state and a brownfield redevelopment agreement with the local government, is relieved of further liability for remediation of the site, and of liability in contribution to anyone who incurs cleanup liability for the site.³⁶ It is unclear whether this immunity extends to civil liability. Second, innocent contiguous owners whose property is contaminated by migration from a nearby designated brownfield site are not subject to judicial action by any person to compel cleanup of, or pay the cost of cleaning up, sites contaminated by materials that migrated onto the property from the designated brownfield area.³⁷ This provision appears clearly to limit civil liability, although it is restricted to

³⁵ Alabama Land Recycling and Economic Redevelopment Act, Ala. Code § 22-30E-9(a).

³⁶ Fla. Stat. § 376.82(2)(a).

³⁷ Fla. Stat. § 376.82(2)(k).

actions to compel cleanup or recover cleanup costs. Whereas the previous immunity is subject to numerous conditions and reopeners, this one requires no cleanup and has no express reopeners.

Georgia has two relevant legislative provisions. First, *bona fide* purchasers and prospective purchasers who complete an approved voluntary cleanup are immune against third party claims for contribution or damages arising from a release of a substance which was the subject of the cleanup plan.³⁸ Second, prospective purchasers, and *bona fide* purchasers who purchased land between 2002 and 2005, who complete an approved voluntary cleanup are immune against liability to the state or third parties for costs incurred in the remediation of, equitable relief relating to, or damages resultant from any pre-existing release.³⁹ It is unclear whether these two provisions limit civil liability or how they relate to each other.

In Missouri, a purchaser of an abandoned or underutilized property who completes a voluntary cleanup to the state's satisfaction as part of an eligible brownfields redevelopment project that generates defined public benefits, enjoys a rather vague immunity against civil liability for cleanup costs or other legal or equitable damages.⁴⁰ Liability may be reopened for new releases, previously unknown conditions, conditions not addressed in the voluntary cleanup, violation of the brownfields redevelopment agreement, failure to remediate the contamination in accordance with the voluntary cleanup plan or legislation, or failure to operate the redeveloped facility in compliance with local, state and federal environmental laws.

Finally, in Virginia, persons who acquire a property after it has already been cleaned up by someone else to the satisfaction of the federal Environmental Protection Agency are immune against "private civil suit" (an undefined term) related to contamination that was the subject of the satisfactory remediation.⁴¹

Conclusion

While several U.S. states have limited civil liability for brownfields redevelopers, a majority of U.S. jurisdictions have declined to do so. Any decisions about limiting civil liability in Canada should be the result of informed deliberation in which all relevant interests, including civil society groups, are adequately represented⁴² and in which all relevant issues are considered. One issue that has been ignored almost entirely in the U.S. is how to protect the interests of the third parties whose rights and remedies

³⁸ Georgia Hazardous Site Response Act, Ga. Code Ann., § 12-8-96.3(c).

³⁹ Georgia Hazardous Site Reuse and Redevelopment Act, Ga. Code Ann., § 12-8-207(a).

⁴⁰ Missouri Abandoned Property Redevelopment Projects Law, Mo. Rev. Stat. § 447.714.

⁴¹ Virginia Brownfield Restoration and Land Renewal Act, Va. Code § 10.1-1235.

⁴² The composition of both the New Brunswick and Ontario consultative groups mentioned earlier is cause for concern on this basis. See, *supra*, footnotes 3 and 4 and accompanying text.

are limited. None of the statutes identified above makes any provision for redressing the harm suffered by the innocent third parties whose claims are barred. It is possible that legislators simply did not turn their minds to this issue, or decided that third parties merited no protection.⁴³ Happily, proponents of civil liability relief in Canada do not appear to suggest that innocent third parties be left out in the cold. But a great deal more attention still needs to be paid to how third parties' rights would be protected.

Another critical set of questions is what, precisely, are the civil liability scenarios that pose the greatest obstacles to brownfields redevelopment and how serious is the risk of such liability, in terms of both magnitude and probability. Any legislative action on civil liability must be informed by a clear, common understanding of what the liability risks actually are, and what the difference is, if any, between actual and perceived risk. Work towards such an understanding is under way, but there is still ground to cover.

Next, it is important to recognize that civil liability has been a secondary concern in American liability relief initiatives. The primary objective in most cases has been to ease regulatory liability and prevent aggrieved parties from using common law to circumvent the statutory scheme. Civil liability relief is, in most cases, quite narrow in terms of the scope of liabilities limited, the parties eligible, or the conditions they must meet to acquire and retain immunity. Most of the immunity provisions described above do very little to alter the *status quo*. They apply in circumstances where civil liability risk is low, or they reduce liability only marginally to give "an extra push to help turn around the sites that the market comes close to turning around on its own".⁴⁴ This does not mean that they serve no purpose. Even if they make little difference to civil liability rules, they may still be valuable insofar as they enhance certainty about liability risk.

Many of the U.S. liability relief statutes are vague, ambiguous, unnecessarily convoluted and remarkably poorly drafted. Many key terms are undefined and poorly understood, making it difficult to tell in a few cases whether the legislation was intended to limit civil liability and, in many cases, what kinds of civil liabilities are limited, in what circumstances. This is due in part to differences in legislative processes between Canada and the U.S., but it underlines the importance of careful and clear legislative drafting.

More importantly, these civil liability relief provisions have not attracted the attention of brownfields lawyers and have had little impact on brownfields revitalization despite the fact that some of them have been in

⁴³ See, e.g., Fla. Stat. § 376.3078(1)(f) (declaring that third party rights barred by the statute are "speculative" and that liability relief is "intended to prevent judicial interpretations allowing windfall awards that thwart the public interest").

⁴⁴ Massachusetts Brownfields regulations, 940 CMR 23.01.

force since the mid-1990s. A clearer picture of why this is so would be very useful to Canadians grappling with these issues, but little or no information appears to be available on this issue.

Finally, we should not assume that any American legislation or experiences can simply be transplanted into Canadian legal soil. Civil liability regimes vary both within and between Canada and the U.S. Civil liability risk is influenced significantly by the regulatory environment, including the nature and degree of regulatory cleanup liability and governments' enforcement cultures. There are substantial differences both between the United States and Canada, and within Canada, on these points. We should think carefully about these differences before drawing any conclusions about the applicability of American legal initiatives here.